United Nations A/C.6/61/SR.17

General Assembly
Sixty-first session

Official Records

Distr.: General
15 November 2006

Original: English

## Sixth Committee

**Summary record of the 17th meeting**
Held at Headquarters, New York, on Tuesday, 31 October 2006, at 4.30 p.m.

*Chairman*: Mr. Gómez Robledo ..... (Mexico)

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Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*)

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06-59384 (E)

*The meeting was called to order at 4.40 p.m.*

**Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session** (*continued*) (A/61/10)

1. **Ms. During** (France) said that she would not comment on the draft guidelines on reservations to treaties adopted by the International Law Commission at its fifty-eighth session, except to point out that, in her delegation's view, draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations) did not reflect the law or the practice relating to the role of the depositary. The draft guideline gave the depositary the power to assess the validity of reservations and, where appropriate, inform interested parties of a reservation that, in its view, raised legal problems. The depositary should not, however, have such a power in the absence of a provision expressly authorizing it. Its duties should be limited to registering and communicating reservations, even if it considered them "manifestly invalid".

2. The draft guidelines relating to the competence of the treaty monitoring bodies, currently being considered by the Drafting Committee of the Commission, raised questions not unrelated to the point she had made about draft guideline 2.1.8. Although it was not uncommon for such bodies to be given competence to assess the validity of reservations, draft guideline 3.2.1 (Competence of the monitoring bodies established by the Treaty) seemed to confer competence to assess the validity of reservations as a direct result of the competence to monitor the treaty. Although, as the Special Rapporteur was at pains to emphasize, the text did not aim to give such bodies competence for which no provision had been made, it would be preferable to find a formulation that avoided such an automatic link and rather emphasized the need to insert in treaties clauses specifying the competence of monitoring bodies to assess the validity of reservations, as set out in draft guideline 3.2.2.

3. Draft guidelines 3.2.3 (Cooperation of States and international organizations with monitoring bodies) and 3.2.4 (Plurality of bodies competent to assess the validity of reservations) were unexceptionable, although their usefulness was questionable. That was the case, in particular, with draft guideline 3.2.4, which seemed not to consider the possibility that monitoring bodies might disagree on the validity of reservations.

4. Her comments naturally applied also to the competence of the human rights treaty bodies. In that connection, the Commission had requested the views of Governments on adjustments they considered necessary to introduce in the "Preliminary conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including Human Rights Treaties", adopted by the Commission at its forty-ninth session. In her delegation's view, conclusions 1 to 3 and 10 were entirely acceptable. Conclusions 5 to 9, however, should be reviewed in the light of the comments made at the fifty-eighth session on draft guidelines 3.2 et seq. and the outcome of the Commission's meeting with United Nations experts in the field of human rights.

5. The question of non-validity of reservations, which the Commission had started to discuss during its fifty-eighth session, was a difficult one, which the Vienna Conventions on the Law of Treaties had not resolved. For that very reason, the Commission should try to clarify the questions of the consequences of non-validity and the effect of an objection to a reservation. If it failed to do so, the Guide to Practice would not fully meet the expectations that it had legitimately aroused. Above all, the Committee should, when it came to discuss draft guidelines 3.3.2 to 3.3.4, clarify the concept of nullity and show the distinction between the separate effects of unilateral and collective acceptance of a reservation.

6. The new definition of the object and purpose of a treaty, contained in draft guideline 3.1.5, represented a marked improvement on the original wording, whichever of the alternatives was chosen, by stressing the rights and obligations indispensable to the "general architecture" of the treaty, thus making it possible to observe both the spirit and the letter — or the "balance" — of the treaty.

7. The principle contained in draft guideline 3.3 (Consequences of the non-validity of a reservation) was entirely acceptable, although its title did not really reflect the content of the guideline, which related rather to the causes of non-validity. Draft guideline 3.3.1 (Non-validity of reservations and responsibility), on the other hand, usefully showed that the consequences of the non-validity of a reservation arose from the law of treaties, not the law of international responsibility.

8. **Ms. Wilcox** (United States of America) said, in relation to reservations to treaties, that the Commission should proceed cautiously in considering what types of reservation might be invalid because they were incompatible with the object and purpose of a treaty. It should recognize that many States had felt able to become parties to treaties owing to the possibility of making appropriate reservations in the light of their national laws or legal systems. The Commission should also give careful consideration to statements drawing attention to the fact that monitoring bodies should not be assessing the validity of reservations unless the treaty expressly gave them that authority, which was very unusual.

9. With regard to unilateral acts of States, a particularly challenging topic, she said that the Guiding Principles adopted by the Commission were a fitting conclusion to the Commission's work on the topic. Her delegation welcomed the Commission's decision to focus on formal declarations formulated by a State with the intent to produce obligations under international law. States should be able to make public statements without fearing that they might inadvertently be creating obligations that were binding under international law; they should be bound by unilateral public declarations only when they intended to be. The efficacy of the Commission's principles lay in the extent to which they would serve that objective. The provision in Guiding Principle 7 that, in case of doubt, obligations must be interpreted in a restrictive manner, was essential in any determination as to the legal effect of a unilateral declaration. The Commission's conclusions regarding the interplay between unilateral declarations and peremptory norms of international law should not give rise to any controversy. There could be no question of unilateral declarations by a State trumping peremptory norms of international law.

10. Her delegation was concerned by the content of Guiding Principle 10, which concerned the revocation of unilateral declarations. There was an understandable desire to limit arbitrary revocations of unilateral declarations in cases where a State had clearly manifested its intent to be bound and there had been detrimental reliance on that declaration by the addressee. It was not obvious, however, that conditions should be imposed upon the revocability of such declarations, in accordance with the principle embodied in article 62 of the Vienna Convention on the Law of Treaties (Fundamental change of circumstances). A fundamental change of circumstances might justify the revocation of a declaration even if there had been a clear manifestation of intent to be bound and notwithstanding the other considerations set out in article 62 of the Convention. Since unilateral declarations were not the same as agreements negotiated among States, rules relating to the revocation of such agreements should not necessarily apply automatically to unilateral declarations.

11. **Mr. Makarewicz** (Poland) noted that between its fiftieth and its fifty-seventh sessions the Commission had provisionally adopted 71 draft guidelines on reservations to treaties, with some 20 more in the pipeline. The numbers were impressive, but he feared that the proliferation of detailed guidelines held out little hope for a successful conclusion to the topic in the near future.

12. Draft guideline 3.1 (Permissible reservations) might well be superfluous, in view of the rules contained in the Vienna Convention on the Law of Treaties. The only reason to retain it would seem to be the desire to make the draft guidelines a complete statement of the rules on reservations to treaties. Draft guideline 1.6 (Scope of definitions), meanwhile, needed clarification. There was no explanation of what the "rules applicable to them" were or where they could be found.

13. Draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations) gave rise to concern, for it inappropriately extended the functions of the depositary. According to a well-established customary rule, codified clearly in the 1969 and 1986 Vienna Conventions, the depositary was a neutral administrator of a treaty, with an obligation to act impartially. There was no requirement for it to pass judgment on the legality of the instruments deposited with it, except with regard to technical matters of a purely formal nature. The draft guideline would be detrimental to that rule and create more problems than it sought to solve.

14. With regard to the recommended meeting between the Commission and United Nations experts in the field of human rights, his delegation would be offering the Commission its view on possible adjustments to the "Preliminary conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including Human

Rights Treaties", adopted by the Commission at its forty-ninth session.

15. Turning to the topic of unilateral acts of States, he said that the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations were, despite the many years of work devoted to the topic, descriptive rather than prescriptive. Moreover, their scope was restrictive: not only were they limited to unilateral declarations of State capable of creating legal obligations but were a departure from the Commission's previous approach, which had generally been based on analogies with the law of treaties. Regrettably, their adoption of the second reading seemed to have definitively concluded the Commission's work on the topic. Nor had any serious consideration been given to the ninth report (A/CN.4/569 and Add.1) of the Special Rapporteur, who had clearly been unable to convince the Commission to persist with its original approach. The end result was not entirely satisfactory, but it might be the only possible one, given the serious differences of opinion on the topic within the Commission and among States. Perhaps the time was not yet ripe for more developed codification. Meanwhile, State practice might develop faster thanks to the existence of the Guiding Principles, which would, at least, enable States to judge with reasonable certainty whether and to what extent their unilateral conduct was legally binding at the international level and would thus strengthen the principle of good faith in international relations.

16. **Ms. Kaplan** (Israel), addressing the topic of reservations to treaties, said that her delegation still had some doubts concerning both alternative versions of draft guideline 3.1.5 (Definition of the object and purpose of the treaty) or (Incompatibility of a reservation with the object and purpose of the treaty). Such elements as "essential rules", "raison d'être", "general architecture" or "balance of the treaty", which were common to both alternatives, did not add any substantial clarification and might even complicate the definition of the object and purpose of the treaty.

17. With regard to draft guideline 3.2 (Competence to assess the validity of reservations), her delegation proposed a number of amendments, as a result of which the provision would read:

"The following are competent to rule on the validity of reservations to a treaty formulated by a State or an international organization:

- The other contradicting States (including, if applicable, their domestic courts) or other contracting organizations;
- Dispute settlement bodies that are authorized by the contracting States as competent to interpret or apply the treaty and reservations to it; and
- Treaty implementation monitoring bodies established by the treaty and authorized by it as competent to interpret or apply the treaty and reservations to it."

The purpose of the proposed changes was to avoid implied authorization for any monitoring body to pass judgement on the validity of reservations. In addition, she wondered what relevance the ruling of a domestic court had to the validity of a reservation under international law. In Israel, domestic court rulings affected only internal law.

18. With regard to draft guideline 3.2.1 (Competence of the monitoring bodies established by the Treaty) the first paragraph should similarly be reworded to read: "Where a treaty establishes a body to monitor application of the treaty, and authorizes it to make decisions on reservations to treaties, that body shall be given competence by the contracting States to assess the validity of reservations ...".

19. In accordance with its view that the role of the monitoring bodies should be given explicit expression, her delegation favoured the deletion of the square brackets in draft guideline 3.2.3 (Cooperation of States and international organizations with monitoring bodies). Her delegation accepted draft guideline 3.2.4 (Plurality of bodies competent to assess the validity of reservations), but drew attention to the fact that the different mechanisms for assessing the validity of reservations might not be mutually compatible.

20. Consideration should be given to deleting draft guideline 3.3.3 (Effect of unilateral acceptance of an invalid reservation), which was somewhat ambiguous, as well as seeming to contradict draft guideline 3.2.4. As for draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation), the depositary's role was, in her delegation's view, a purely technical one. The draft guideline should therefore be very cautious in extending that role. Secondly, the meaning

of the term "collective acceptance" was unclear. In some cases, there might be a need for unanimous acceptance rather than merely collective acceptance. The decision on whether a specific case had achieved collective acceptance or not might have far-reaching consequences and was therefore, beyond the authority of the depositary. Such a procedure might also create vagueness and undesirable differences between the text of the treaty and its actual meaning.

21. With regard to the topic of unilateral acts of States, the Commission should insist on a rigid approach to Guiding Principle 4: under Israeli law, for example, ministers or high-ranking officials required express authorization in order to engage the State through unilateral acts or declarations.

22. In view of the possibility of misunderstandings regarding declarations by States, and their sensitive nature in the context of inter-State relations, she urged the Commission to pay special attention to Guiding Principle 7, which called for a restrictive interpretation of such declarations. In case of any doubt concerning a State's intention, it was preferable to interpret a declaration as non-binding under international law. Her Government would attribute legal significance to its own or other States' unilateral acts only if there existed a clear and unequivocal intention to effect binding legal consequences.

23. **Mr. Pellet** (Special Rapporteur) welcomed the opportunity to respond to the Committee's comments on the draft guidelines on reservations to treaties. In his view, the dialogue between the special rapporteurs of the International Law Commission and the members of the Sixth Committee was very important in reinforcing the relationship between the two bodies. Nevertheless, there were two significant limitations to that dialogue. First, Governments' comments generally arrived, after the Commission had taken a position on the proposals submitted by its special rapporteurs. Once the Commission had adopted a set of draft articles or guidelines on first reading, it generally did not re-examine them until the second reading several years later, and it was only then that the comments of States, whether made in the Sixth Committee or submitted in writing following the adoption on first reading, would be taken fully into account.

24. That was not to say that the discussion in the Sixth Committee was not useful. On the contrary, it enabled the special rapporteur to discern trends and get a sense of the majority opinion — when there was one — on the draft articles or guidelines under discussion. If the members of the Sixth Committee expressed strong reservations about something, most special rapporteurs would modify their proposals accordingly. Moreover, the discussion in the Sixth Committee could be very useful in charting the course for the Commission's future work. Indeed, one of the most helpful forms of input that Governments could provide was suggestion of topics for study by the Commission. As he had said on previous occasions, however, the Committee's deafening silence in that regard was cause for concern. Governments could also influence the Commission's work on a particular topic by responding to the issues raised each year in chapter III of the Commission's report.

25. The second limitation to the dialogue between the special rapporteurs and the Committee was of a different nature: once the Commission had adopted a set of draft articles or guidelines, they no longer "belonged" to the special rapporteur, and it could happen that the draft ultimately submitted to the Sixth Committee for discussion did not reflect his or her personal convictions.

26. Turning to the topic of reservations to treaties, he had taken note of the generally negative reaction to draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations), in particular the role assigned to the depositary, which most speakers had seemed to regard as excessively important. He assumed that that view also applied to draft guideline 3.3.4, although not many speakers had said so explicitly. While the Commission should certainly bear those reservations in mind at the second reading of the draft guidelines, he was a little surprised at the sudden outcry over draft guideline 2.1.8, which had been adopted by the Commission and discussed by the Sixth Committee three or four years earlier. It had been included, together with its slightly modified commentary, in the Commission's report for 2006 only because the Commission had decided to replace the words "permissibility" and "non-permissibility" with "validity" and "invalidity" or "non-validity". He sincerely did not understand why there would be reluctance to use the concept of validity in respect of reservations. It was essential to draw a distinction between valid and invalid reservations. Whether or not a reservation was valid mattered a great deal, and, in his opinion, an objection to an invalid reservation

should not be subject to the same rules as an objection to a valid reservation.

27. He was similarly puzzled at the opposition of some States to his attempt, in draft guideline 3.1.5, to clarify the ambiguous concept of the object and purpose of the treaty. When the Commission, with the support of the Sixth Committee, had decided to re-open the question of reservations to treaties, despite the existence of the Vienna Conventions, it had been at least in part because of the lack of clarity — in doctrine, jurisprudence and State practice — with regard to that fundamental concept. In his view, it might be possible to achieve greater clarity by combining draft guidelines 3.1.5 and 3.1.6, which he considered inseparable.

28. His proposals regarding the role of treaty bodies seemed generally to have been well received, the only criticism of the draft guidelines being that they were not detailed enough. The Committee's comments in that regard would doubtless lead the Commission, during its next session, to revisit its 1997 preliminary conclusions, which were closely related to the complex issue of the role of treaty bodies. He continued to believe that it would be extremely useful to organize a meeting with United Nations experts in the field of human rights, including representatives from human rights treaty bodies, and appealed to the Committee and to the General Assembly to express explicit support for such a meeting in the resolution to be adopted on the report of the International Law Commission on the work of its fifty-eighth session.

29. Some delegations had remarked on the slowness with which the work on the topic was proceeding. That might be true, but the subject was an extremely complex one, from both a theoretical and a practical standpoint. It was preferable, in his view, to proceed slowly and carefully in order to produce a Guide to Practice that would truly be useful to States in dealing with problems relating to reservations to treaties.

30. He thanked the Committee for its comments on the topic. Although he might disagree with some of the views put forward, he could assure members that the Commission and its Drafting Committee attached great importance to the input received from the Sixth Committee and would consider all comments with an open mind.

31. Speaking as the Chairman of the Working Group on Unilateral Acts of States, he said that several delegations had noted that the Commission had limited its study of the topic to unilateral declarations of States. That was because the Commission had deemed that it would be impossible to draw any specific conclusions on any aspect of the topic other than unilateral declarations made by States with the intention of creating legal obligations. If Governments wished the Commission to broaden the scope of its work to include other aspects, they should express that view. However, the Working Group on the Long-term Programme of Work, after weighing the pros and cons, had not recommended the inclusion of unilateral acts of States on the Commission's long-term programme of work, and in the absence of specific instructions from the Sixth Committee, it was unlikely that the Commission would pursue the topic any further. Hence, Governments would need to decide whether the adoption of the Guiding Principles and their accompanying commentary marked the conclusion of the Commission's work or whether additional work on the topic should be undertaken.

*The meeting rose at 5.55 p.m.*

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United Nations A/C.6/61/SR.18

General Assembly
Sixty-first session

Official Records

Distr.: General
17 November 2006

Original: English

## Sixth Committee

**Summary record of the 18th meeting**
Held at Headquarters, New York, on Wednesday, 1 November 2006, at 10 a.m.

*Chairman*: Mr. Gómez Robledo ..... (Mexico)
*later*: Mr. Barriga (Vice-Chairman) ..... (Liechtenstein)

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Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*)

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06-59615 (E)

*The meeting was called to order at 10.10 a.m.*

**Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session** (*continued*) (A/61/10)

1. **Mr. Pambou-Tchivounda** (Chairman of the International Law Commission), introducing chapters X-XII of the Commission's report, said, with regard to chapter X, "Effects of armed conflicts on treaties", that in 2006 the Commission had had before it the second report of the Special Rapporteur, covering draft articles 1 to 7 (A/CN.4/570 and Corr.1). The report had focused on the comments on those draft articles made in the Commission and the Sixth Committee in 2005.

2. Summarizing the debate in the Commission (A/61/10, paras. 182-211), he said that reference had been made to the fact that it was not possible to maintain a strict separation between the law of treaties and other branches of international law, especially that relating to prohibition of the use or threat of force in international relations. Suggestions had been made to broaden the scope of the topic to include, inter alia, the effect on the rights of third States parties to a treaty, the distinction between effects on specific provisions of the treaty as opposed to on the entire treaty, as well as that between the effects on the treaty itself and those on the obligations arising from it.

3. With regard to the use of terms, draft article 2 (b), which defined "armed conflict", had remained controversial. Support had again been expressed for including non-international conflicts, military occupations, and territories under international administration. However, each of those proposals had been criticized, particularly because the latter situations were not traditionally viewed as part of a definition of armed conflict. A strong opinion had been expressed that an aggressor State could not be placed on an equal footing with the State exercising its right to self-defence, whether individual or collective, in accordance with the Charter of the United Nations.

4. General support had been expressed for the retention of draft article 3, albeit subject to drafting changes. As in 2005, draft article 4 had attracted criticism for its reliance on the criterion of intention. It had been suggested that the criterion had lost its significance after the Second World War and that it was not realistic to think that parties contemplated the effect of an armed conflict on a treaty at the time of its conclusion. Comments on draft article 5 had focused primarily on its formulation. General support had been expressed for the Special Rapporteur's proposal to delete draft article 6. Draft article 7 had again elicited suggestions as to the inclusion or deletion of specific categories of treaties. The Special Rapporteur suggested that the list of treaties should be replaced by an annex containing State practice and jurisprudence. Another suggested approach had called for enumerating the factors which might lead to the conclusion that a treaty or some of its provisions should continue or should be suspended or terminated in the event of armed conflict. Lastly, it had been decided not to transmit the draft articles to a working group but to await a third report by the Special Rapporteur.

5. Turning to chapter XI, "The obligation to extradite or prosecute (*aut dedere aut judicare*)", he recalled that the topic had been included in the Commission's programme of work in 2005. At its fifty-eighth session the Commission had considered the preliminary report by the Special Rapporteur (A/CN.4/571), which contained a set of observations concerning the substance of the topic, marked the most important points for further consideration and included a preliminary plan of action for future work.

6. Summarizing the debate in the Commission (A/61/10, paras. 215-232), he said that much of the debate had focused on proposals to delimit the scope of the topic, for example, by restricting it to only certain categories of crimes under international law, particularly the most serious ones, and limiting the scope of the work to the objective of the obligation, namely, to combat impunity by eliminating safe havens for persons suspected of having committed such crimes. The status of the obligation under customary international law had also been discussed. It had likewise been suggested that the Commission should consider certain practical difficulties encountered in the process of extradition. As to the Special Rapporteur's treatment of the topic's relationship with the principle of universal jurisdiction, a general preference had been expressed for drawing a clear distinction between the concepts and focusing only on the obligation to extradite or prosecute. The Special Rapporteur had also advised against considering the so-called "triple alternative", involving the concurrent jurisdiction of an international tribunal.

7. Preliminary support had been expressed for proceeding on the basis of draft rules to be proposed by the Special Rapporteur. The Commission had also recommended that future work on the topic should be undertaken on the basis of a systematic study of State practice, focusing on contemporary practice, including national jurisprudence. Accordingly, paragraphs 30 and 31 of the Commission's report contained additional details on the type of information the Commission would appreciate receiving from Governments in connection with the topic.

8. With regard to chapter XII, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", he recalled that the topic had been included in the Commission's programme of work in 2002. The Commission had established a Study Group that year which had finalized its work in 2006, enabling the Commission to complete its work on the topic as well. The objective of the Study Group's work had been to prepare a two-part outcome. The first part, which was to comprise a condensed set of conclusions emerging from the studies and discussions of the Study Group, was embodied in sections D I and D.II of chapter XII, entitled "Background" and "Conclusions of the work of the Study Group", respectively. In particular, the 42 conclusions in section D.II were intended to be a concrete, practice-oriented set of brief statements that summarized the conclusions of the Study Group and constituted a set of practical guidelines to help thinking about and dealing with issues relating to the issue of fragmentation in legal practice. As noted in chapter II of its report, the Commission had taken note of the conclusions and had commended them to the attention of the General Assembly.

9. The second part of the outcome was to be a relatively large analytical study prepared on the basis of the outlines and studies submitted by individual members of the Study Group, which was to describe the phenomenon of fragmentation from the point of view, in particular, of the Vienna Convention on the Law of Treaties. The analytical study, which provided the background against which the 42 conclusions had been elaborated, had been finalized (A/CN.4/L.682 and Corr.1), was available on the Commission's website and would be included in its *Yearbook*.

10. In accordance with earlier decisions endorsed by the Commission, the Study Group had focused on the substantive aspects of fragmentation, setting aside institutional considerations pertaining to fragmentation such as conflict of jurisdiction between particular judicial institutions. More generally, the Study Group had adopted a perspective emphasizing international law as a legal system. In its view, the rules and principles of such a system acted in relation to and should be interpreted against the background of other rules and principles. The general related to the particular in a web of interrelationships in which no regime was self-contained in the sense that it could operate in a vacuum without any connection with general international law.

11. The various rules relationships existed on several levels, whether vertically as in hierarchical rules or horizontally. The formulation of the rules could involve greater or lesser specificity and generality and their validity or priority might date back to earlier or later moments in time. In such a rules-based system, general principles of treaty interpretation, including the principle of harmonization, the principle of integration and principles such as *lex specialis*, *lex posterior*, *lex prior* and *lex superior*, were applied to resolve conflicts. Articles 30, 31, 32, 41 and 53 of the Vienna Convention on the Law of Treaties were invoked to untangle a web of complex legal questions. The Vienna Convention provided all the tools of the law of treaties needed to resolve most problems encountered in international law as a legal system.

12. The 42 conclusions in section D.II reflected a common effort to address the substantive aspects of fragmentation. General conclusions (1) to (4) situated the interplay of rules relationships within that legal system, in which practitioners were involved in a process of legal reasoning to resolve normative conflicts. The Study Group had focused on four approaches to the resolution of conflicts of norms in international law. The first pertained to the relationship between special and general law, as reflected in conclusions (5) to (16) concerning the study of the function and scope of the *lex specialis* rule and the question of self-contained regimes. The second concerned the relations of law to its normative environment. Conclusions (17) to (23), on the study on the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (art. 31 (3) (c) of the Vienna Convention on the Law of Treaties), addressed that aspect. The third approach concerned the relations between the *lex prior* and the *lex posterior*, which were

reflected in conclusions (24) to (30) relating to the study on the application of successive treaties relating to the same subject matter (art. 30 of the Vienna Convention) and the study on the modification of multilateral treaties between certain of the parties only (art. 41 of the Vienna Convention). The fourth approach concerned the relations between laws at different hierarchical levels, which were reflected in conclusions (31) to (41) on the study on hierarchy in international law, in particular *jus cogens*, obligations *erga omnes*, and Article 103 of the Charter of the United Nations. Conclusion (42) addressed the overarching theme borne out by the study, namely, the principle of harmonization, which admittedly had its own limitations, particularly when genuine conflicts were involved. It was hoped that the conclusions would help users to focus on the core issues that would enable them to resolve complex legal issues relating to normative conflicts.

13. There was no question that the fragmentation of international law reflected the diversity of the international social order. It was thus a natural and almost inevitable phenomenon. Indeed, one of the main conclusions of the analytical study was that the emergence of special regimes or other forms of functional specialization in international law had not seriously undermined legal security, predictability or the equality of legal subjects. At the same time, the international system was neither homogeneous nor hierarchical. It was therefore necessary to pay increasing attention to questions concerning the collision of norms and regimes and to the principles, methods and techniques for dealing with such collisions. There was an obvious need for technical vigilance among practitioners in a continuous process of legal reasoning to address conflicts that might arise.

14. The topic had been placed on the Commission's agenda because of concerns that the unity of international law was under threat; that the "general" had been giving way to the "special". The results of the Study Group's work provided hope that that was perhaps not entirely the case. General international law was the thread holding relations among States together within the international legal system. As the web of international law grew wider, its practitioners must ensure that conflicts were resolved bearing in mind the omnipresence of general international law.

15. **Ms. Jacobsson** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that those countries had, from the outset, taken a great interest in the topic on the fragmentation of international law. First, the topic was an important one; second, the Commission had allowed itself to undertake work on a topic that did not necessarily lead to the further codification or progressive development of international law. Rather, in helping to explain a phenomenon of the current legal environment, it had addressed the question of how international lawyers might tackle the practical consequences of the widening scope and expansion of international law.

16. The Nordic countries viewed the fragmentation of international law as a sign of the vitality and increasing relevance of international law. States regulated real and potential problems through a variety of legal instruments and new or existing institutions. The resulting diversification, or fragmentation, of international law could be quite challenging. The 42 conclusions adopted by the Study Group were practical and would help practitioners and theoreticians to apply a systematic approach when they sought to analyse and solve problems arising from conflicting or parallel norms.

17. The Study Group's conclusions had a strong focus on States as the creators of legal norms and emphasized that most international law was dispositive law. Particular attention was paid both directly and indirectly to the principle *pacta tertiis nec nocent nec prosunt* (agreements neither bind nor benefit third parties). Although the Study Group had been correct to use the Vienna Convention on the Law of Treaties or the principles reflected therein as the general framework for its analysis, the Nordic countries regretted that it had left the question of institutions aside and had concluded that the issue of institutional competencies was best dealt with by the institutions themselves. Since States created, used and even dissolved institutions, institutional competencies must be recognized as the creations of States. As such, they might ultimately be subject to the will of States, however strong and independent the institutions might act or appear. It was therefore not entirely satisfactory to leave institutional matters to institutions. The issue of institutional competencies and their relation to and place in the substantive legal system definitely merited further examination.

18. That said, the Nordic countries trusted that the conclusions of the Study Group would be used as much

as the Commission's articles on State responsibility were. It was to be hoped that the entire body of the Commission's substantive documents on the fragmentation of international law, which functioned as a valuable commentary to the conclusions, would attract a publisher who would make them available to the wider international community.

19. **Ms. Popova** (Bulgaria) said that her delegation supported the general approach proposed by the Special Rapporteur on effects of armed conflicts on treaties. It agreed in particular with the premise that treaties should continue during an armed conflict unless there was a genuine need for suspension or termination, a premise that could be traced back to the principle *pacta sunt servanda* and the aim of promoting the security of legal relations between States. Bulgaria also supported the premise that the topic, although closely related to other domains of international law such as humanitarian law, self-defence and State responsibility, formed part of the law of treaties. The third element of the general approach endorsed by her delegation was the differentiated method — the premise that different effects were possible for different treaties.

20. With regard to scope (draft article 1), the question had arisen whether the draft articles should differentiate between bilateral and multilateral international treaties. In her delegation's view, the pattern of the Vienna Convention on the Law of Treaties should be followed in that regard in drafting the articles. In addition, Bulgaria would welcome extension of the scope of the draft articles to cover agreements concluded between international organizations and between States and international organizations, as well as regional agreements. In that way the draft articles would also cover agreements on the privileges and immunities of international organizations and their officials. Her delegation was also in favour of extending the scope of the draft articles to treaties being applied provisionally, as provided for in article 25 of the Vienna Convention, since such treaties were in fact operative and hence could be affected by an armed conflict in the same manner as treaties that had already entered into force. It was true, of course, that the Convention itself did not contain a general rule on the suspension or termination of the provisional application of treaties, dealing only with the case where the provisional application of a treaty was terminated because of the declared intention of a State not to become a party to it. Nevertheless, thought should be given to the question of whether the outbreak of an armed conflict would suspend or terminate the provisional application of treaties, the treaties themselves or both. For the sake of the clarity and stability of legal relations Bulgaria would prefer the latter option but was keeping an open mind.

21. With regard to the use of terms (draft article 2), the definition of "armed conflict" was one of the most sensitive aspects of the topic. Although there was agreement that the draft articles should not deal with the legality of armed conflicts, opinions varied widely on what the definition should include, the debate revolving chiefly around whether or not to include non-international armed conflicts. Internal armed conflicts had significantly outnumbered international armed conflicts in recent decades, and the distinction between the two was often blurred. A narrow definition would tend to strengthen the treaty regime while a broad definition might jeopardize it, yet a narrow definition would limit the relevance of the draft articles. The definition employed in the *Prosecutor v. Duško Tadić* case considered by the International Tribunal for the former Yugoslavia, cited by the Special Rapporteur in his second report (A/CN.4/570, para. 10), covered non-international armed conflicts, including internal conflicts where governmental armed forces were not involved, and avoided the complications deriving from the reluctance of some States formally to declare a state of war. Her delegation hoped that a deadlock on the issue could be avoided by stressing the limitation set forth in the chapeau of draft article 2, namely, that the definition was merely "for the purposes of the present draft articles". The definition employed in the *Tadić* case or a simpler formulation stating that the articles applied to armed conflicts whether or not there was a declaration of war could be used as a starting point for further discussion. Her delegation did not favour the alternative of following the language of article 73 of the Vienna Convention, which used a synonym, "hostilities", since that also required a definition. Moreover, "the outbreak of hostilities" had a temporal dimension and referred mainly to the beginning of the conflict. That would fit very well in draft article 3 but not in draft article 2. Of course, the term "armed conflict" could be used and not defined, leaving it to be determined on a case-by-case basis whether the draft articles applied to a particular conflict, taking into account the nature and extent of the conflict, but then definitions of the

"nature" and "extent" of a conflict might prove to be needed.

22. Her delegation agreed that draft article 3 contained the main philosophy of the provisions and articulated the departure from the traditional doctrine according to which treaties were terminated by armed conflict. Bulgaria welcomed the decision to replace "ipso facto" by "necessarily", since that wording made allowance for the abrogating effect of war on some treaties.

23. With regard to draft article 4, Bulgaria shared the concerns of other delegations regarding the difficulties of determining the intention of the parties and thought that the criteria for survival of treaties during an armed conflict should be sought primarily in their character, subject and objective. The indicative list put forward in draft article 7, paragraph 2, was indispensable in that regard. Intention should be explored only for treaties that were borderline cases. Bulgaria shared the general approval of draft article 5, which explicitly reaffirmed the principle that treaties containing express provisions stating that they were operative in case of an armed conflict would remain in force in wartime and the principle that armed conflict did not affect the capacity of States to conclude treaties. Draft article 6 on treaties relating to the occasion for resort to armed conflict was consistent with the general principle of the continuation of treaties during armed conflict. The general, and suitable, presumption was established that treaties whose status or interpretation had provoked the armed conflict would remain in effect unless the contrary intention of the parties was proved. It bore a relation to article 60 of the Vienna Convention on the Law of Treaties, which dealt with the hypothesis of a material breach as grounds for termination and suspension of the operation of a treaty, but went a step further by referring to the status and the interpretation of a treaty as possible grounds for termination or suspension of its operation.

24. With regard to draft article 7, her delegation agreed that some of the categories of treaties listed in paragraph 2 could be classified under the heading of "law-making treaties", in the sense of treaties that created rules for regulating the future conduct of the parties without creating an international regime, status or system. While the view could not be contested that most treaties did not automatically fall into one of the several categories listed, draft article 7 was useful in its current form, as the indicative list could provide clarity and guidance in the so-called "grey-area cases". Of course, an annex could be developed, either to replace paragraph 2 of the draft article or to complement it.

25. **Mr. Hafner** (Austria), referring to the topic "Effects of armed conflicts on treaties", said that his delegation wished to reaffirm its position that the draft articles should deal only with international armed conflicts. As the Special Rapporteur himself had pointed out, an extension of their scope of application would increase the number of problems. The distinction between international and non-international armed conflicts might be difficult to draw, but it was justified for several reasons. First, international humanitarian law was still based on such a distinction. Second, the other State party to a treaty might not be aware of the existence of a non-international armed conflict in a State, so that the inclusion of such conflicts in the scope of the draft articles would be detrimental to stability and predictability, two main objectives of the international legal order. Third, since no other State was involved in a non-international armed conflict, it was unclear to which other States parties the effects of the draft articles would then apply. Such situations should instead be governed by the provisions of the law on treaties. Other phenomena like the "war on terrorism" should certainly not be dealt with in the draft articles. However, his delegation supported extending them to cover military occupations, as addressed by the 1949 Geneva Conventions and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and treaties to which an international organization was a party.

26. His delegation looked forward with great interest to the future work of the Commission on the obligation to extradite or prosecute. The Special Rapporteur had already referred to Austrian legislation in his preliminary report (A/CN.4/571, para. 44).

27. The conclusions presented by the Study Group on the fragmentation of international law constituted a remarkable outcome along the lines originally intended and convincingly demonstrated that the task of the Commission was not limited to codification but encompassed other work relating to the development and application of international law. The conclusions drew attention to the problems arising out of the increased diversity of international law and highlighted the legal techniques and existing norms that governed the relations between the different regimes of

international law. His delegation hoped that the 42 conclusions would be taken note of by the General Assembly and published in the *Yearbook of the International Law Commission*. His delegation concurred with the contents of the conclusions *grosso modo*. Their wording, however, indicated the legal problems connected with the issue, as they quite frequently resorted to vague expressions such as "often" or "mostly", reflecting the fact that the general system of international law did not provide clear guidance on how to resolve possible conflicts of norms, a matter that was becoming more acute in a time when fragmentation was increasing. For more detailed comments on the topics he had mentioned, he drew attention to his delegation's written statement.

28. **Mr. Tajima** (Japan) said that the draft articles on the effects of armed conflicts on treaties should draw a distinction between the effects on bilateral treaties and those on multilateral treaties and between belligerent States and third States. Without drawing those distinctions, it could not be determined in a specific case whether treaties would or would not be suspended or terminated by armed conflicts. Moreover, it might not be correct in the light of the Charter of the United Nations to assume that there was no difference between an aggressor State and a State exercising its right of self-defence with regard to the legal effect of armed conflict on treaty relations. His delegation agreed that consideration should be given to situations involving non-State actors, such as non-international armed conflict and terrorism, in addition to armed conflict between States. However, since the effects on treaties of armed conflict involving non-State actors would not be precisely the same as the effects of armed conflict involving State actors alone, it would be appropriate to examine those differences. His delegation concurred with the Commission's decision that the draft articles were not yet ready for referral to the Drafting Committee.

29. His Government was particularly interested in the extent to which the obligation to extradite or prosecute had become customary international law, since ambiguity in that area could cause problems in addressing the issue of impunity. The Commission had requested information on legislation and practice on the topic. Regarding treaties containing the obligation to extradite or prosecute, Japan had concluded multilateral treaties, such as counter-terrorism treaties, including the Convention on the Physical Protection of Nuclear Material; narcotics control treaties, including the Single Convention on Narcotic Drugs; and anti-corruption treaties, including the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It had made no reservations to any of those treaties. Japan had also concluded bilateral extradition treaties with the United States of America and the Republic of Korea, which obliged the parties to extradite fugitives to the other party upon request. However, there were several restrictions on extradition under those treaties, and they contained no provisions on the obligation to extradite or prosecute, at least not in the strict sense, nor did Japanese domestic legislation on extradition contain provisions on such an obligation.

30. Although the two products of the Study Group on the fragmentation of international law, the analytical study and the conclusions, did not represent the collective view of the full Commission and did not have legal effect for interpreting related treaties and principles, they nonetheless had considerable value in that they presented possible ways for States to address the issue in their international legal practice. His delegation fully appreciated the importance of the principle of harmonization in interpretation and hoped that the Study Group's conclusions would be widely referred to as a useful guideline.

31. **Mr. Lammers** (Netherlands), referring to the topic "Effects of armed conflicts on treaties", said that the issue of scope was dealt with rather succinctly and somewhat imprecisely in the Special Rapporteur's second report (A/CN.4/570 and Corr.1). The Commission had discussed the aspect of provisional application as an issue of whether or not the draft articles should cover treaties not yet entered into force. That might be too simple a way of looking at the reality of treaty practice, since there were treaties that had not yet entered into force but were provisionally applied by some States, and there could be treaties that had entered into force for some States and were provisionally applied by others. At issue was whether the multi-layered nature of treaty relations in the multilateral system was sufficiently covered in the work of the Special Rapporteur. It might be necessary to distinguish between the effects of armed conflict on bilateral treaties or treaties with a limited number of parties, on the one hand, and multilateral treaties, on the other.

32. With regard to the definition of armed conflict in draft article 2, it was important to keep in mind that no definition of armed conflict currently existed. The Commission must be careful not to draft a definition that could create problems in other fields of law, such as the law of armed conflict. It might to helpful to approach the International Committee of the Red Cross on the matter to ensure that the definition arrived at would not encroach upon the important work done in the field of international humanitarian law. The current definition was somewhat circular and referred to the outdated concepts of "war" and "declaration of war".

33. His delegation would prefer that the definition of armed conflict should include non-international armed conflicts, because such conflicts could seriously affect a State's ability to execute its treaty obligations. For the same reason, the definition should include military occupations. The inclusion of non-international armed conflicts would be a reference to a factual situation and in no way an expression of support for any of the parties to such a conflict. Inability to perform a treaty would be established by evaluating the factual situation in relation to the type of performance required from the State party under the treaty. However, consideration should be given to the position of the other party or parties, which might see their right to performance by their counterpart evaporate as a consequence of a conflict situation in that State. That was not a matter of interpretation but rather of execution of a treaty. The question was whether a State, which could not rely on its internal law as a justification for its failure to perform a treaty, might rely on an internal conflict as such justification. That suggested a situation like that contemplated in article 61 of the Vienna Convention on the Law of Treaties. Although the issue went beyond the definitions in draft article 2, it would require consideration in the future.

34. The obligation to extradite or prosecute (*aut dedere aut judicare*) was instrumental in achieving a world system of justice which deprived perpetrators of safe havens. In the era that had seen the establishment of the International Criminal Court, States had come to realize that there was a certain — at least moral — obligation to act, whether by extraditing or by prosecuting alleged perpetrators of the most serious crimes. However, in order to have the possibility of choosing between extradition and prosecution, a State must have jurisdiction, otherwise the only option open was extradition, which was in principle only possible where there was double incrimination. Theoretically it was therefore possible that a State might not be in a position to extradite because of the lack of a treaty or lack of double incrimination and at the same time unable to prosecute because of lack of jurisdiction. Such was the situation that the maxim *aut dedere aut judicare* aimed to combat, and where universal jurisdiction became an important complement to it.

35. Normally the State in which the offence occurred would have jurisdiction to prosecute an international crime. In practice, however, it was conceivable that non-territorial States might also have jurisdiction depending on varying degrees of connection with the offence (active personality principle, passive personality principle or protective principle). The obligation to extradite or prosecute had in recent years been included in many treaties concerning international crimes, giving States parties not only the capacity but also the obligation to exercise universal jurisdiction. The obligation was one to act, through extradition or prosecution, and presupposed the presence of the suspect in the territory of a State.

36. On the question of whether the obligation *aut dedere aut judicare* derived exclusively from treaties or also constituted a general obligation under customary international law, the Netherlands saw the obligation to extradite or prosecute as an obligation, created by treaty, to prosecute a person for whom extradition had been refused for crimes for which the Netherlands had criminal jurisdiction, on the basis of universal jurisdiction, specific treaties or national legislation. That position derived on the one hand from international human rights law, which prohibited arbitrary deprivations of liberty; from the constitution of the Netherlands, which explicitly prohibited any deprivation of liberty not based on a written rule of law; and from article 2 of the Extradition Act, which stated that extradition could occur only on the basis of a treaty to which the Netherlands was a party. In recent years the Netherlands had been adopting legislation accepting universal jurisdiction and the consequences of abiding by the *aut dedere aut judicare* rule, as contained in a number of treaties, by codifying implementation laws relating to international crimes (war crimes, genocide and torture) and crimes against humanity and by withdrawing its reservations to a number of treaties in relation to the precondition that an extradition request must have been made and refused before criminal jurisdiction could be exercised.

Legislation was being prepared on the last point. Although some multilateral treaties imposed the obligation *aut dedere aut judicare*, it did not necessarily follow that there existed a general rule of customary law with regard to universal jurisdiction that would impose such an obligation on States not parties to a treaty. That view was in line with the findings of the International Committee of the Red Cross in its study on customary international law.

37. The obligation to extradite or prosecute was construed by the Special Rapporteur as giving a State the choice between the two alternatives, but that view presupposed the existence of a choice, whereas in practice that was not always the case, for the reasons he had already explained. The Special Rapporteur had also suggested that there might be a third alternative: the transfer of the case to a competent international tribunal. The Netherlands saw that option rather as a variation on the theme of extradition, possible only in the event that a request had been made. With regard to the lack of a monitoring system, it was doubtful whether it would add anything to what was already known.

38. On the issue of priority jurisdiction, if the aim was to deny perpetrators of heinous crimes safe haven, it was an interesting idea that perhaps States with priority jurisdiction might have the obligation to exercise jurisdiction and to that effect request the extradition of the suspect. The concept was in line with the principle of complementarity in the Rome Statute of the International Criminal Court, whereby States had the first responsibility to prosecute and only in the event that a State was unwilling or unable did the Court have jurisdiction.

39. The obligation should first and foremost relate to crimes for which universal jurisdiction already existed by treaty: war crimes, genocide, torture, and terrorism. Although the Rome Statute presupposed national implementation regarding crimes against humanity, to date only two instruments on specific crimes against humanity had been concluded: the Convention against Torture and the International Convention on the Suppression and Punishment of the Crime of Apartheid. The Netherlands would be in favour of creating a regime of universal jurisdiction covering the full array of the category of crimes contemplated by article 7 of the Rome Statute. The creation of universal jurisdiction would be a means to make sure that both options — *dedere* and *judicare* — were open, so that there would be no impunity and no safe haven.

40. Following the establishment of the International Criminal Court and the events of 11 September 2001, debate on universal jurisdiction and the *aut dedere* principle had been revived in the Netherlands. With the implementation of the Rome Statute in the Netherlands legal order and codification of the relevant international crimes, the Parliament had given the public prosecutor's office the means to deal with complex criminal cases resulting from *aut dedere aut judicare* treaty obligations. That had led to the prosecution of a number of individuals under universal jurisdiction; the cases were summarized in the annex to his written statement.

41. With regard to the fragmentation of international law, he agreed that it was the result of uncoordinated expansion; from being a tool for regulating formal diplomacy it had become an instrument for dealing with a huge variety of international activities. In some cases, fragmentation could lead to conflicts between different rules and regimes and thereby undermine their implementation.

42. The framework provided by the Vienna Convention on the Law of Treaties did indeed offer the international community with a means of unifying international law. For that reason, it might be advisable for the Commission to study and ultimately recommend guidelines for the application of article 31, paragraph 3 (c), of the Convention. The broad formulation of that subparagraph supplied the interpreter of a treaty with a valuable tool for reconciling conflicting rules. The Commission could also build on the case law of the International Court of Justice, starting with the *Oil Platforms* case.

43. He concurred with the Commission's final recommendation that conflicts between rules of international law should be resolved in accordance with the principle of harmonization. It was axiomatic that fundamental principles of international law such as *pacta sunt servanda*, the precedence of *jus cogens* over all other obligations under international law and the opposability of *erga omnes* obligations to all States would continue to serve as means of combating fragmentation. Those principles could also be strengthened by States through their bilateral and multilateral contacts and also by international courts and tribunals and the writings of international lawyers.

44. **Mr. Wang** Chen (China) said that the draft articles on the effects of armed conflicts on treaties were, as the Special Rapporteur had observed, preliminary in nature and in need of substantiation. Some treaties to which international organizations were parties might be related in some way to armed conflicts. In practice, international organizations had been directly involved in several armed conflicts. The latter were therefore likely to have direct effects on treaties concluded by the organizations in question and on other States parties to those treaties. For that reason, treaties concluded by international organizations should be studied under the topic.

45. Military action taken by a State against internal rebel groups should not come within the purview of the draft articles, but that did not mean that a State could disregard its international and treaty obligations. A State was responsible for implementing treaties at the international level; internal conflicts did not generally have a direct bearing on the effective execution of treaties.

46. The definition of an armed conflict contained in the 1985 resolution of the Institute of International Law reflected the traditional and universal understanding of an armed conflict and should serve as a reference. Although the definition of an armed conflict given by the International Tribunal for the former Yugoslavia in the *Tadić* case had included conflicts among different armed groups within a State, that definition was relevant only to that particular trial and did not appear to be universally accepted as a general rule.

47. The intention of State parties at the time a treaty was concluded was indeed of fundamental importance for that treaty. Nonetheless, since the Charter of the United Nations explicitly prohibited recourse to force in international relations, States parties did not need to contemplate the different impact that peace and war would have on the provisions of a treaty and therefore there was no such thing as the anticipation of armed conflicts in treaty law. Consequently the criterion of intention for determining the effect of armed conflicts on treaties seemed outdated. It would, perhaps, be better to determine whether a treaty would continue to apply during an armed conflict on the basis of the viability of the treaty itself and of a contextual approach encompassing an examination of the object and purpose of the treaty and the nature and extent of the armed conflict.

48. Draft article 3 on *ipso facto* termination or suspension constituted a departure from the traditional view that the outbreak of an armed conflict meant the termination of the operation of a treaty. It clarified and justified practice since the Second World War and safeguarded the viability of the treaty. It should therefore be retained.

49. Draft article 7 contained a useful list of the types of treaties which remained in operation during armed conflicts. The Commission should also study the elements which were common to those treaties in order to provide better guidance for the future. It should likewise examine the relationship between the legality of the use of force and the provisions of the Charter of the United Nations relating to the use of force and self-defence, as well as the various effects of the legal and illegal use of force on treaty relations.

50. The preliminary report of the Special Rapporteur on the obligation to extradite or prosecute (A/CN.4/571 and Corr.1) had helped to clarify the focus of future work on the topic. International security and development were currently facing grave threats from international, transnational and terrorist crimes. The obligation to extradite or prosecute was of immense practical significance for the promotion of international cooperation in combating those crimes effectively and ending impunity. The study of that topic should therefore place greater emphasis on the progressive development of relevant rules designed to foster cooperation in that sphere.

51. The Commission should first analyse treaty provisions and investigate State practice in the fields of treaty implementation, legislation and case law, in order to ascertain whether the obligation to extradite or prosecute was purely a treaty obligation or a general obligation under customary international law. Many recent treaties contained the obligation to extradite or prosecute in respect of certain crimes. Given the universal nature of those treaties, it would seem that in certain areas, such as counter-terrorism, the obligation to extradite or prosecute was gradually being accepted by the whole of the international community. For that reason, it might be useful to study the relationship between the obligation to extradite or prosecute and the principles of sovereignty, human rights protection and universal jurisdiction and the reciprocal effect of those principles on each other.

52. The obligation to extradite or prosecute should apply to serious international and transnational offences, including war crimes, crimes against humanity, genocide, torture and terrorist crimes and, in some cases, crimes under domestic law which caused significant harm to the State and the interests of the people. The traditional arguments marshalled against extradition for the latter crimes had hindered the punishment of offenders. Such impunity would be ended if States were placed under an obligation to extradite or prosecute in respect of those offences and that in turn would help to restore law and order and uphold justice.

53. The report produced by the Study Group on the fragmentation of international law (A/CN.4/L.682 and Corr.1 and Add.1) was of great academic value and its conclusions would serve as a useful source of practical information. They should therefore be studied carefully by Governments, international organizations and jurists.

54. **Mr. Alday** (Mexico) said the obligation to extradite or prosecute was a cornerstone of international criminal law. The General Assembly had made it part of the United Nations counter-terrorism strategy, as a key principle in combating the international crime of terrorism. Its growing usefulness for States was demonstrated by its incorporation into a number of international treaties, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. However, the obligation to extradite or prosecute was neither a universal principle nor an established rule of customary law.

55. According to the Special Rapporteur, when studying the question it was also necessary to examine the issue of universal jurisdiction, which applied only to crimes so serious that they affected the international community as a whole. When such crimes were committed, States had both a right and a duty to exercise universal jurisdiction. A State which had arrested a perpetrator of such a crime but was unable to try him with all the attendant guarantees of fair trial, must extradite him to such other State as made a request in proper form, or to an international criminal tribunal.

56. The principle *aut dedere aut judicare* was also codified in a number of treaties, showing that it applied to crimes other than those covered by universal jurisdiction. It was important to preserve the distinction between the principle itself and the exercise of universal jurisdiction, in order to prevent abuses of the jurisdiction for political or other reasons. He agreed with the Special Rapporteur that "the obligation to extradite or prosecute is constructed in the alternative, giving a State the choice to decide which part of this obligation it is going to fulfil" (A/CN.4/571, para. 49). That placed the exercise of State sovereignty at the heart of the discussion. Effective application of the principle meant enhancing the capacity both of local courts and of international criminal tribunals. Incorporation of the principle into judicial practice, both national and international, would serve to strengthen the role of the International Criminal Court. However, the proper application of the principle would not be achieved through codification alone. It also depended on the will of States, which had to combat impunity through the criminal law. It was they who had to strike a balance between their national systems of criminal justice and the international order.

57. **Mr. Al-Adhami** (Iraq), referring to chapter X (Effects of armed conflicts on treaties), agreed that it would be wise for the Special Rapporteur to examine the effects of armed conflicts on treaties concluded by international organizations. He also considered it necessary to study the effects of armed conflicts on treaties which had not yet entered into force, or which had not yet been ratified by the parties to the conflict, in order to preclude differences of opinion on the matter with regard to draft article 2 (b), since internal armed conflicts could result in the non-application of some treaties, they ought to be dealt with in the text as well.

58. Concerning draft article 4, the intention of the parties was a crucial factor in determining the susceptibility of a treaty to termination or suspension when the treaty itself contained no provisions on the matter and when the *travaux préparatoires*, the context in which the treaty had been concluded and the nature of the treaty shed no light on the subject.

59. He welcomed the Special Rapporteur's readiness to revisit draft article 7, which his Government had some difficulty in accepting.

60. **Mr. Sandoval Bernal** (Colombia), commenting on chapter X (Effects of armed conflicts on treaties), said that any consideration or development of the law of treaties must pay due heed to the guiding principle *pacta sunt servanda* as a *jus cogens* norm binding on

all members of the international community. The fulfilment of treaty obligations was, in turn, governed by the principle of good faith set forth in Article 2, paragraph 2, of the Charter of the United Nations.

61. Compliance with treaties and their execution in good faith guaranteed international peace and security. Any loopholes which would end the validity of international agreements in a manner inconsistent with international law would jeopardize harmony between nations and give rise to endless disputes.

62. The Vienna Convention on the Law of Treaties should constitute the legal benchmark of any work related to the law of treaties. It was therefore essential to avoid any reinterpretation or development of its provisions which might alter their spirit and content. The International Court of Justice had consistently held that most of the Convention's articles set forth customary law, something which enhanced its legal value.

63. The rules on the termination and suspension of treaties laid down in that instrument were precise and rigorous and that was a further reason to proceed with care when considering the possible effects of armed conflicts on treaties. All treaties should be complied with in full by the parties to them, for whom they were the law. The validity and inherent inviolability of some treaties due to their subject matter could not be undermined for any reason whatsoever. Article 62, paragraph 2 (a), of the 1969 Vienna Convention and article 11 of the 1978 Vienna Convention on Succession of States in respect of Treaties both provided that no fundamental change in circumstances might be invoked as a ground for terminating or withdrawing from a treaty establishing a boundary. Hence any examination by the Commission of the effects of armed conflicts on treaties should rest on the assumption that armed conflicts could not serve as a pretext for non-compliance.

64. The definition of a treaty should be that contained in article 2 (a) of the 1969 Vienna Convention and should therefore be confined to treaties already in force and governed by international law. To avoid unnecessary repetition, the draft article in question needed merely to contain a reference to that definition rather than repeating it in full. The definition of an armed conflict in draft article 2 (b) was indeed tautological. In order to obviate the risk of an imprecise or inadequate definition, the draft article should simply refer to the 1949 Geneva Conventions. There was no point in incorporating a definition of internal armed conflicts, because they did not affect relations between States and should not therefore give rise to the termination or suspension of existing treaties, unless otherwise provided in the treaty in question. Nor should military occupation be included.

65. The text of draft article 3 ought to be retained as it stood for the sake of contract certainty, except that its title should be changed to "Validity of treaties". Draft article 4 rested on the premise that, when States entered into treaties, they were in the habit of considering the possibility of the outbreak of armed conflicts after the entry into force of those instruments, whereas in fact treaties were concluded in order to strengthen relations between States, promote cooperation and avoid disputes or conflicts. For that reason, it was inadvisable to retain a draft article predicated on the intention of the parties to suspend or terminate the application of treaties in the event of an armed conflict.

66. Draft article 5 was unnecessary and would lead to misunderstandings. If treaties in general were not suspended or terminated by armed conflicts, that was all the more true of treaties expressly covering such situations. Draft article 5 would be thoroughly redundant if draft article 4 were kept. The will of the parties was clearly expressed by the existence of such treaties and no such clause was therefore needed. Moreover the outbreak of an armed conflict clearly did not prevent the parties from concluding legal agreements on the suspension or waiver of a treaty concerned with such situations. Hence paragraph 2 of the draft article served no useful purpose. Legally speaking, armed conflicts never weakened or abolished the sovereign right of a State to conclude treaties.

67. Draft article 6 was also unnecessary and should be deleted. Although an article along the lines of draft article 7 was appropriate, it should not contain an arbitrary list of treaties which might create an *a contrario* presumption that treaties not included would automatically lapse in an armed conflict. Instead draft article 7 ought to set forth the guiding principles for determining exactly which treaties, by virtue of their nature or purpose, would never be affected by an armed conflict. In drawing up such a provision, one guiding principle should be the inviolability of certain treaties on account of their subject matter. If a list of treaties applying even during an armed conflict was retained after all, it must include treaties establishing borders.

68. **Mr. Kuzmin** (Russian Federation), commenting on the draft articles on responsibility of international organizations, expressed agreement in principle with draft article 28. States should not be able to evade their responsibility by hiding behind the "veil" of an international organization. The text should, however, be redrafted to draw a clear distinction between a situation in which providing an organization with competence in a certain field was itself a breach of international law, and one in which the competence was lawful but the use made of it was not. Draft article 29 made it clear that the responsibility of an international organization for internationally wrongful acts derived from its status as a subject of international law. Its effect was to limit the instances in which a State could be responsible for the acts of such an organization. However, it was conceivable that an international organization would not always be in a position to compensate a victim of its internationally wrongful acts. He therefore preferred the wording of subparagraph (a) of draft article 29, paragraph 1, to that of subparagraph (b). A State which had acted to endow an international organization with legal personality must also give it the means to fulfil its functions, including those which had led it to incur responsibility towards a third party. It should also be evident that States and international organizations were bound to cooperate to terminate unlawful acts by an international organization, just as if it were a State.

69. Turning to the draft articles on the law of transboundary aquifers, which could become a draft convention, he welcomed the provision in draft article 3 on the sovereignty of aquifer States over portions of a transboundary aquifer within their territory. It would be useful to make it clear, in that draft article, that the sovereignty of the aquifer State was also governed by the rules and generally accepted principles of international law. Draft article 14 should make it clear that a legal regime for activities covered by the draft articles could only be established with the consent of the aquifer State. The question whether the topic "Shared natural resources" should include the problems relating to oil and gas needed further consideration. He saw no current need for universal rules on the latter subject.

70. He welcomed the Guiding Principles on unilateral declarations of States, and was glad to note that the Commission had confined itself to principles governing declarations intended by their author States to give rise to obligations under international law. He agreed with the statement in the preamble to the Guiding Principles that States could even be bound by their silence. Unilateral acts of that sort were not, of course, open to codification. In drafting the Guiding Principles, the Commission had taken the correct approach by identifying the specific characteristics of unilateral acts, rather than slavishly copying the pattern of the Vienna Convention on the Law of Treaties. The text of the Guiding Principles was, he believed, ripe for submission to the General Assembly.

71. He welcomed the Commission's work on the fragmentation of international law, and especially the emphasis placed on the systemic nature of international law, the interrelationship of the different categories of norms and the optimal methods of interpreting and applying international law. The concepts of *jus cogens* and obligations *erga omnes* were vital to preserving the integrity of international law. He welcomed the statement on the principle of harmonization, contained in paragraph (42) of the Study Group's conclusions. In the light of that principle, the "danger" of fragmentation became hypothetical. The Commission's draft on the topic would eventually become a valuable tool in the daily work of ministries of foreign affairs, and could now be submitted by the General Assembly to the scrutiny of States.

72. He endorsed the draft guidelines adopted by the Commission on reservations to treaties. The draft clarified issues not covered in the Vienna Conventions: which kinds of reservations were permissible, and which were prohibited by the terms of the treaty and which were not. He had some concern, however, about draft guideline 2.1.8, on procedure in case of manifestly invalid reservations. That draft article contradicted the notion in the Vienna Convention on the Law of Treaties of the strictly technical function of the depositary. He did not object to giving the depositary power to judge that a reservation was manifestly invalid, but the powers of the depositary did not go any further. The commentary should make it clear that it was not the intention of the draft guideline to extend them unduly. It should also include a definition of "manifest invalidity".

73. With regard to the Commission's preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, he urged a cautious approach to the question whether treaty-monitoring bodies had authority to rule on the validity

of reservations. Identifying the object and purpose of a treaty was not the same thing as interpreting its provisions. A distinction should be drawn between the power to decide that a reservation was manifestly invalid, and the power to assess its validity in the light of the treaty's object and purpose. The two kinds of assessment could have different legal consequences, and it would be better to state simply that monitoring bodies could make recommendations as to the validity of a reservation. The preliminary conclusions were silent on whether and how monitoring bodies should take account of the earlier views of States concerning reservations. Moreover, it was not clear what should be done if the monitoring body and the States parties to the treaty took a different view on the validity of a reservation. That should be given careful consideration when the Commission came to deal with the consequences of invalid reservations.

74. Turning lastly to the effects of armed conflicts on treaties, he endorsed the central proposition, in draft article 3, that the outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties. However, the principle of automatic termination would, as before, apply to certain categories of treaties, especially treaties of friendship and cooperation. That was why the phrase "ipso facto" was to be replaced by "necessarily". Draft article 3 should also distinguish between the effects of armed conflict for treaty parties both of which were parties to the conflict, and as between parties to the conflict and third parties. The draft articles should also spell out the effects of armed conflicts on treaties with international organizations, and the consequences for treaties which had been signed but were not yet in force and for treaties temporarily in force. The draft articles should not cover internal armed conflicts, which were already governed by the general rules of the Vienna Convention on the Law of Treaties concerning circumstances in which a treaty could be terminated. He was dubious about the term "intention of the parties" as a criterion for determining the consequences of an armed conflict. That was a subjective criterion, subsidiary to other more important ones such as the character of the armed conflict, the parties to the conflict, the scope for implementing the treaty during an armed conflict, and the object and purpose of the treaty.

75. *Mr. Barriga (Liechtenstein), Vice-Chairman, took the Chair.*

76. **Mr. Serradas Tavares** (Portugal), commenting on the draft articles on the effects of armed conflicts on treaties, said certain core issues needed further work. For instance, the proposed definition of "armed conflict" should take account of more up-to-date concepts, such as those found in the report of the High-Level Panel on Threats, Challenges and Change. A broader definition would be more satisfactory, leaving it to be determined on a case-by-case basis which kinds of hostilities might have effects on particular treaties. He did not favour including internal conflicts within the scope of application of the draft articles. Internal conflicts did not directly affect the treaty relationships between States parties to a treaty, and should be dealt with in the framework of the Vienna Convention on the Law of Treaties. The draft articles should be confined to situations where relations between States parties were seriously destabilized. He shared the Commission's view that an aggressor State should not be placed in the same position as a State exercising its right of self-defence.

77. His delegation continued to doubt the advisability of placing in draft article 3 the general rule of continuity, which was itself the core of the topic. Since neither State practice nor treaty practice offered sufficient guidance, it would be best not to formulate any general rule at all. Moreover, the references to "the intention of the parties" in draft article 4 introduced a rather subjective criterion, because that intention could not readily be determined. It was unrealistic to believe that treaty parties, when negotiating a treaty, foresaw the effects an armed conflict would have on it. It would be best to choose more objective criteria, such as the object and purpose of the treaty, the norms of the treaty, or the legality of the actions of each party to the conflict.

78. Draft article 7 had the merit of ensuring that norms of humanitarian law, human rights or *jus cogens* would be brought into play. While approving the chosen method of categorizing treaties, his delegation was open to other solutions which would achieve the same result.

79. Turning to chapter XI on the obligation to extradite or prosecute, he expressed general agreement with the Commission's proposals for its continuing work on the topic, and with its cautious approach to the scope of the topic. He emphasised the importance of clarifying and harmonizing procedures for complying with the obligation, and of encouraging close

cooperation among States. Portugal, as a party to a number of bilateral, regional and universal treaties on extradition or prosecution, was working for closer cooperation with other States to prevent the creation of safe havens. It had, however, entered certain reservations to those treaties in line with its own constitution, which prohibited extradition on political grounds or for crimes which would attract unduly severe penalties in the requesting State. Portuguese citizens could only be extradited in cases of terrorism and international organized crime, and where conditions of reciprocity had been established by treaty and a fair trial was guaranteed by the law of the requesting State. The political crimes for which extradition was not permitted specifically excluded crimes recognized under customary international law, such as genocide, crimes against humanity and war crimes.

80. Commenting on the work of the Study Group on the fragmentation of international law (chapter XII), he concurred with the view that there was no homogeneous system of international law. However, international law was a true "system" with rules capable of solving the problems of contradictory legal regimes and judicial decisions. The contribution of the Commission was to alert States to the issue. The draft conclusions, being straightforward, neutral and well founded in case law, were useful tools for States facing particular problems in the interpretation or application of norms. He particularly welcomed conclusions (31) to (42) on the issue of hierarchy in international law, *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations. He hoped the General Assembly would take note of the conclusions and refer them to the attention of States.

81. **Mr. Fitschen** (Germany), commenting on the topic on fragmentation of international law, welcomed the conclusions of the Study Group's work. He pointed out that although the relationship between two or more treaties covering related issues was sometimes far from clear, causing difficulties in their interpretation, diplomats representing States during negotiations on the drafting of a treaty were well aware of the possible overlap of subject matter and therefore avoided regulating matters which could result in unravelling or reopening an existing text. Safeguard clauses in treaties were clear evidence of the negotiators' dilemma and of their decision, in such cases, to postpone the question of how to harmonize one treaty with another to the application stage. States themselves had ultimately to effect the harmonious application of the various treaties to which they were parties. The assumption should always be that States intended to conclude treaties that could and should be interpreted in an integrated manner. That was also true at the national level, when treaties were being incorporated into domestic law and the corresponding provisions of domestic law had to be reconciled. The question also arose of how to interpret the tools for interpretation contained in the Vienna Convention on the Law of Treaties, in a world of multiple "conflicts" of international law and where the meaning of treaties was influenced by subsequent practice, including statements by Governments, international organizations and other actors. It was precisely in that field that the merit of the Commission's work lay: a number of important ideas were included in the conclusions and would serve the purpose the Commission had intended.

82. It would be helpful for negotiators of future treaties, when addressing issues of conflict of international laws, to have at hand some practical tools of treaty interpretation. Difficult as it might seem for the Commission to deliver another outcome suitable for that purpose, his delegation was open to any practical proposal in that connection. He particularly wished to suggest, for consideration by the Commission, the question: "Adapting international treaties to changing circumstances: What constitutes subsequent agreement and subsequent practice, and in which way do they affect the implementation and interpretation of treaties?".

83. **Mr. Lindenmann** (Switzerland) welcomed the conclusions of the Study Group on the fragmentation of international law. He understood the decision, for reasons of space, not to reproduce the study itself in the Commission's report. That was nevertheless regrettable, given the practical usefulness of the study, and he hoped it would be published in other forms and widely disseminated.

84. **Mr. Hmoud** (Jordan) commended the Commission's efforts to develop draft articles on the important topic "Effects of armed conflicts on treaties", which was part of the law of treaties and should be kept separate from the law on the use of force. Unless derogation from treaty obligations was dealt with independently of the question of the lawfulness of the use of force, different sets of rules and different legal consequences would result. The

premise should be that war was an exceptional circumstance vis-à-vis treaty application and that its effect on such application should be minimal.

85. With regard to draft article 1, his delegation considered that the scope of application should extend to treaties to which international organizations were parties. The treaty rights and obligations of international organizations frequently had substantial effects on international relations and the international economy. To exclude them would create a legal gap in situations where States and international organizations were parties to the same treaty, especially where the treaty obligations were interrelated.

86. In draft article 2, he would prefer a simpler definition of "armed conflict", avoiding issues that should properly be addressed elsewhere. The Commission should, however, define what was meant by "treaties" for the purpose of the draft articles, looking to definitions in other international instruments and other branches of international law.

87. He would prefer to retain draft article 3, to make clear that the general rule was that the treaty obligations should apply in all situations and that exceptional circumstances should have the least possible effect. In referring to termination, the term "ipso facto" was a better choice than "necessarily".

88. In draft article 4, his delegation recognized the importance of "intention", which might be a primary factor in determining the susceptibility of treaties to termination or suspension during armed conflict. However, since evidence of intention might be problematic where the treaty contained no provision concerning the effect of war, relying solely on the test of intention would have two effects. First, the treaty would be presumed to continue to apply fully during an armed conflict. Second, a party to the treaty engaged in armed conflict would have no option of suspending or terminating the treaty even if obliged to do so, and would have to derogate from the treaty, thus committing a wrongful act. It was true that the party concerned could rely on the rules on international responsibility to preclude wrongfulness, but that seemed to be unnecessarily complicated. Moreover, there seemed to be no reason why susceptibility to termination or suspension on the basis of intention should be dealt with, in draft article 4, while leaving other possible grounds for derogating from a treaty during armed conflict to other branches of international law. He was therefore in favour of exploring other possible factors affecting susceptibility to termination or suspension, such as the nature of the obligation derogated from and the extent and nature of the armed conflict. The latter factor was independent and not related to the "intention" factor as was the case according to draft article 4.

89. Concerning draft article 7, his delegation agreed that the object and purpose of some treaties negated the possibility of suspension or termination in the event of armed conflict. However, only those categories of treaties which were well known to have that effect should be included in the scope of the draft article. If the categorization exercise proved to be too problematic, the final commentary to the draft articles could mention certain such categories of treaties by way of illustration.

*The meeting rose at 1.05 p.m.*